Ebroadburl Realty Corp. t/a Power Equipment Company *and* Local 269, International Brotherhood of Electrical Workers, AFL–CIO. Case 4–CA–26249

November 22, 1999

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND BRAME

On October 16, 1998, Administrative Law Judge Earl E. Shamwell Jr. issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions ands briefs[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Ebroadburl Realty Corp. t/a Power Equipment Company, Hainesport, New Jersey, it officers, agents, successors, and assigns, shall take the action set forth in the Order.

Henry E. Protas, Esq. and *Michael C. Duff, Esq.,* for the General Counsel.

J. Eric Kishbaugh, Esq., of Gibbsboro, New Jersey, for the Respondent.

Richard T. Aicher Jr., Assistant Business Manager/Organizer, of Trenton, New Jersey, for the Charging Party.

DECISION

STATEMENT OF THE CASE

EARL E. SHAMWELL JR., Administrative Law Judge. This case was heard before me on May 18, 1988, in Philadelphia, Pennsylvania, pursuant to a charge filed by Local 269 of the International Brotherhood of Electrical Workers, AFL–CIO (the Union), on July 14, 1997, against Ebroadburl Realty Corp. t/a Power Equipment Company (the Respondent); and a complaint issued on December 11, 1997, by the Regional Director for Region 4. The complaint alleges that the Respondent violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act) by discriminatorily discharging its employee, Jonathan Smith, because he supported and assisted the Union. The Respondent thereafter filed an answer denying the commission of any unfair labor practices.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs and arguments of the General Counsel and counsel for the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a New Jersey corporation, with an office and facility in Hainesport, New Jersey, is a contractor engaging in the installation, service, and maintenance of electrical and mechanical systems for commercial and residential projects and facilities. During the year ending December 31, 1997, in conducting its business operations described above, the Respondent provided services in excess of $50,000 directly to customers located outside the State of New Jersey. The Respondent admits, and I find, that at all times material, it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted, and I find, that at all material times, Local 269, International Brotherhood of Electrical Workers, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICE

A. Factual Background[1]

Since its inception in 1974, the Respondent engaged primarily in selling, servicing, and maintenance of emergency electrical generators for various businesses and organizations, such as hospitals. Over the years, the Respondent had built a clientele of repeat and long-term customers with whom it did and continues to do business on a regular basis.

In about 1984, William Friend and his wife Susan became the sole shareholders and owners of the Respondent; W. Friend assumed the presidency of the Company and S. Friend, the vice presidency at that time. The Respondent admits, and I find, that William (W. Friend) is, and has been, a supervisor of the Respondent within the meaning of Section 2(11) of the Act. The Respondent employed various categories of employees, including salespeople, clerical, and various technical and/or skilled workers.

Historically, during the winter months—December through March—of any given year, the Respondent experienced a slowdown in its service-related work.[2] Accordingly, probably as a counter measure, in January 1996, the Respondent decided to expand its customary business to include large scale electri-

[1] We deny the General Counsel's motion to strike the Respondent's exceptions.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge, we disavow his finding that Supervisor Frank Emers testified that employees Maurice Wood and Jonathan Smith shared a "very close relationship." We also do not rely on the judge's finding that when the Respondent's owner, William Friend, testified that "[t]his is the thanks I get for being a nice guy," he was referring to Smith's covert union organizing attempts.

[1] In this section, I have determined from the total record—testimonial and documentary and the reasonable references drawn therefrom—matters I have considered to be proven facts, some of which are clearly uncontroverted. To the extent the findings in this section conflict with other evidence, I have discredited such contrary evidence consistent with my findings here.

[2] Friend testified that "during the months of December and January, February and March, you might as well shut your phone off for service work because it doesn't happen." (Tr. 173.)

cal contracting and sought bids on certain electrical projects. Notably, 6 months prior, the Respondent had already undertaken some expansion of its business by taking on heating, ventilation, and air-condition (HVAC) work. However, in January, the expansion began in earnest by the Respondent's purchasing of an existing electrical contracting business (Jacoby Electric). Pursuant to the expansion, the Respondent also required additional employees and during various times placed advertisements in local newspapers soliciting various skilled workers. During the period covering July 1995 through August 1997, the Respondent hired the following (by category) employees:

1. Sales Personnel–4
2. Clericals–11
3. Carpenters–2
4. Generator Technicians–6
5. Locksmith–1
6. Helpers–4
7. HVAC–16
8. Plumbers–6
9. Electricians–9[3]

Significantly, the Respondent hired replacement electricians after the termination of alleged discriminatee John Smith in April 1997.[4]

By the summer of 1996, the Respondent was positioned to bid on significant contracts. In August 1996, the Respondent successfully bid on its first major contract, the Cream O'Land Dairy project which called for substantial plumbing, air-conditioning duct, ventilation, and electrical work; the Respondent commenced work on the project in August and by contract was required to complete it by early January 1997. The Respondent also was the successful bidder on another but smaller project, Super Fresh, which was scheduled to begin promptly after the completion of the Cream O'Land job. Meanwhile, the Respondent continued its customary service related work in 1997 but at the same time it had at least two other projects in mind for bid, notably a proposed Pep Boys (auto parts store) job and another for Pepsico (White Castle Hamburgers).[5] While these proposals were outstanding, the Respondent, through Friend, pressured his sales staff to assiduously pursue other contracts throughout this period of its purported expansion.

As a matter of its personnel policy, the Respondent did not favor layoffs of its employees. Rather, the Company's longstanding policy was to keep its employees working through the lean winter months at their customary wage rate, even if they had to work at tasks beneath or out of their trade.[6]

On or about July 26, 1996, alleged discriminatee Jonathan Smith, responding to an advertisement placed by the Respondent, applied for an electrician's position with the Company; he was unemployed at the time.

On about November 1, 1996, Friend, having determined that he needed an additional two full-time electricians for the Cream O'Land project,[7] called Smith, whose application he had kept on file.[8] Friend ultimately contacted Smith on November 2 and offered Smith the position; Smith accepted the job in that conversation and agreed to report to work the next day, Monday, November 3. Friend directed Smith to report directly to the Cream O'Land site.

Smith did not disclose to Friend at the time of his acceptance that he was a member of the Union and, moreover, that he had agreed with Union Organizer Richard Aicher to act as a covert, unpaid organizer for the Union.[9]

Although he had been reporting as instructed, about twice a month, to Aicher, Smith did not instigate any appreciable organizing of the Respondent's employees from his date of hire through around the middle to late February 1997 when he began somewhat limited discussions about the Union with a fellow electrician, Maurice Wood, who was hired by the Respondent contemporaneously with his own hiring. Smith apprised Aicher of his conversations with Wood. However, because Aicher still did not want Smith's organizer role exposed, Smith only talked about the Union with Wood after work hours and away from the Respondent's jobsites.[10] After work on about February 24, Aicher discussed Smith's organizing activities with him and decided that in light of Smith's conversations with Wood, the Respondent should be advised of Smith's union membership and organizing efforts. Aicher suggested that Smith go to work the next day—February 25—armed with union authorization cards and union literature and talk to the other employees before or after work or at lunch about union representation. Meanwhile, according to the plan, at around 1 p.m. that day, Aicher would fax a letter to the Respondent informing it of Smith's union membership and voluntary organ-

[3] See G.C. Exh. 5. It should be noted that not all of these employees remained in the Respondent's employ for the entire period. These numbers reflect merely that the Respondent hired employees during this period.

[4] These electricians by name were Mark Reckeway, Seth Pearlman, and Brian Orausky. (G.C. Exh. 4; Tr. 77.)

[5] The Respondent never obtained the Pep Boys contract, and the Pepsico contract which it did secure was not formally signed until the end of April or in May 1997.

[6] Friend, with a measure of pride, testified that there were many times during his ownership when certain skilled workers did not have sufficient work to keep them busy. On these occasions, the workers would go out on other jobs and do menial tasks as assigned, such as sweeping floors or other busy work. According to Friend, he never laid off a worker prior to Smith and Maurice Wood, discussed later herein, and only once since, in the case of an HVAC worker, Luis Ortiz, in 1998. These are the Respondent's only layoffs under Friend's ownership of the business.

[7] The Cream O'Land contract contained penalty clauses for the Respondent's failure to meet completion deadlines, and the Respondent determined that it was at risk of not meeting its timeliness requirements at the time of Smith's hiring.

[8] Friend also contacted another electrician, Maurice Wood, about working for the Respondent. Wood had responded to a newspaper ad that the Respondent evidently had placed in November 1996. Wood was offered an electrician's job on November 4 but did not report to work until November 18, 1996, because he was employed by another electrical contractor at the time of the Respondent's offer and wanted to give notice to that employer.

[9] Aicher testified at the hearing that he directed Smith not to disclose his union affiliation (or his organizing purposes) to the Respondent at the time he accepted the job. Smith was instructed to keep in touch with Aicher by telephone and generally report about goings on at the job. (Tr. 21-22.) Smith had joined the Union on August 22, 1996.

[10] Wood did not mention Smith's conversations about the Union to any other of the Respondent's employees or managers while he was employed. According to Wood, Smith's discussions with him about the Union took place in February 1997 when things were getting slow at the Company, and after Smith's discharge. Wood described these prelayoff conversations as being rather general and informational and only in a limited way covered organizing; Smith also advised that the Union was sending him to school. After the two were laid off, he learned more about the Union as Smith talked more about wages and benefits associated with the Union.

izer status and his activities on behalf of the Union.[11] On receipt of this letter, the Respondent was first notified of Smith's activities on behalf of the Union.[12] On February 26, both Smith and Wood reported for work at their usual time. However, they were informed by the shop supervisor that their immediate supervisor, Frank Emers, was not there and, as there was no electrical work for them they were directed to go home.

On February 27, a payday, both Smith and Wood again reported for work and waited around an hour for their supervisor to arrive. At around 8 a.m., Friend, while handing out employee checks, advised Smith and Wood that they were being laid off, citing a lack of work.[13]

B. The Contention of the Parties

The General Counsel contends that Smith was laid off because of his membership in the Union and his organizing activities on behalf of the Union. As to the Respondent's defense that Smith (and Wood) were laid off because of a slowdown in work and specifically the unavailability of any electrical work for Smith,[14] the General Counsel, in essence, asserts that this is a mere pretext for its unlawful acts. Thus, he argues that he has made a prima facie case of a violation of Section 8(a)(3) and (1) of the Act while the Respondent has failed in its burden to rebut his prima facie case.

The Respondent asserts that Smith was laid off for a legitimate business purpose, essentially, the absence of electrical work.[15] The Respondent acknowledges that it received the February 25 letter from the Union but asserts that apart from that, it had no knowledge of Smith's union membership or activities on behalf of the Union. It argues that the record is otherwise devoid of any evidence of its animus against the Union as well as any purported organizing activities on its behalf by Smith. In further support of its position, the Respondent points out that its witnesses testified credibly regarding the slowdown of electrical work. It asserts the General Counsel's position rests solely on what it considers the dubious ground of "suspicious" timing, which to the Respondent is insufficient to establish an unlawful motivation in laying off Smith, given the totality of the facts and circumstances of this case.

C. The Respondent's Defense

The Respondent called three witnesses to establish its economic defense—Maurice Wood, Frank Emers, and Friend.[16] Wood, as previously noted, was hired around the same time as Smith for the Cream O'Land job where both were assigned to do electrical work; Frank Emers was their onsite supervisor. After the Cream O'Land job, both he and Smith were assigned to the Super Fresh project. According to Wood, after Super Fresh, he sensed that business was getting slow, but he was assured by management that a couple of (electrical) jobs were pending. In addition, both he and Smith were performing quite a few residential service upgrade jobs and, thus, were busy. In spite of the apparent slowdown in project work, it was Wood's hope that the Respondent would get the electrical jobs because when he was being interviewed, Friend advised that the Respondent had plenty of work and that he need not worry about layoffs.[17] This was an important (if not the main) consideration for his accepting the job with the Respondent. However, while Wood noticed the work slowdown, he testified that he was never told that a layoff could occur at any time.

Frank Emers was hired by the Respondent in September 1996 as an electrician and served as its Cream O'Land field supervisor and in other capacities. He was an hourly employee who had no executive responsibilities and no share or ownership interest in the Company. According to Emers, it was his observation during and up to the time of Smith's layoff, that the Respondent's economic situation was such that he questioned whether he himself was going to have a job; that "things were looking bad." However, Emers testified that he was not told this by anyone in management, and he only *might* have communicated his feelings to Smith or Wood at one time or the other around February 1997.

I found both Wood and Emers to be in the main credible, but only insofar as they testified about matters within their ken.[18]

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[11] As it turned out, Smith was not assigned to work with the electricians with whom he planned to broach the Union on February 25. He was assigned unexpectedly to help put in a boiler and performed no electrical work that day.

[12] See G.C. Exh. 2. There is no dispute that the Respondent received this letter by fax at about 1 p.m. on February 25.

[13] The Respondent's payroll and other records (R. Exh. 2; G.C. Exh. 5) reflect that Wood's last day of work was February 24. Smith's was February 27. However, irrespective of the last day Wood might have received pay, the credible evidence, including his testimony and the authorization card he signed (G.C. Exh. 4), persuade me to conclude that Wood's official layoff occurred on February 27 along with Smith. Notably, the Respondent evidently concedes this point at pp. 9–10 of its brief.

[14] Wood does not figure at all in the alleged unfair labor practice charges in the complaint. However, he is involved in the matter and, therefore, his layoff will be discussed in tandem with Smith's.

[15] The Respondent has also asserted what I view as certain "make weight" arguments to buttress its claim of the legitimacy of Smith's layoff. For instance, the Respondent asserts that Smith was hired only for the Cream O'Land job. I reject this contention as I have earlier determined that Smith was hired not only for the Cream O'Land job but also in anticipation of the Respondent's securing other electrical contracts.

The Respondent also suggests that in the face of the work slowdown, Smith refused opportunities to receive training for nonelectrical work. I do not credit this as a possible justification for the layoff. Clearly, to me, during his tenure Smith was viewed by the Respondent as a good, reliable, and cooperative worker and was willing to work out of his trade during the alleged slowdown and never refused a nonelectrical assignment. Thus, in my view, the Respondent's defense must succeed or fail on the strength of its proof that Smith was laid off for legitimate economic reasons as opposed to Smith's work habits, attitudes, or other various reasons unrelated to the economic defense.

[16] The Respondent also called its comptroller (since 1988), Wanda McDonald. However, McDonald offered no testimony regarding the Respondent's economic condition. In the main, her testimony was confined to personnel matters, including employee timecards, payroll matters, and employee lists.

[17] On May 18, 1988, Wood provided an affidavit at the instance of the Respondent's counsel (R. Exh. 3) in which he averred, inter alia, that to him the Company's electrical work had decreased and there was not enough electrical work to keep him and Smith busy. Wood also stated that he and Smith were informed that there was insufficient work well before they were laid off. In the affidavit, Wood opines that it was his feeling that he and Smith were laid off for no other reason than a work slowdown. This affidavit appears to contradict Wood's hearing testimony.

[18] Wood, however, was inconsistent in his testimony. However, it is my decided opinion that Wood was confused about his role in this case and what actually happened in the layoff. I believe that after his discharge, Wood sincerely thought that he and Smith were discharged unfairly. Consequently, on February 27, he signed a union authorization card. However, sometime after the charge was filed, he later met

These individuals were hourly workers and, as such, in no way privy to the kinds of economic or fiscal data that would substantiate sufficiently the Respondent's claim of economic justification for the layoff of Smith. Also, both Wood and Emers were mere recent employees and, as such, could not have an informed idea of the Respondent's prior business experience or the vicissitudes of its business cycle. Thus, while they may fairly comment on their perceptions or discernments about the amount of work available based on their limited history with and knowledge of the Company—and conclude there was a serious falling off of work—they were in no position, however, to comment authoritatively about the Respondent's actual economic condition then or as compared to other years. Accordingly, on competency grounds, I cannot credit their testimony for purposes of the Respondent's economic justification for the layoff.

This leaves Friend who, as the Respondent's principal owner and the person charged with the oversight of the Company's operations, testified about the circumstances leading to Smith's (and Wood's) layoff.

According to Friend, both Smith and Wood were hired because of the Company's need to fulfill completion schedules for the electrical phase of the Cream O'Land contract. The electrical phase of the contract was completed in early (the first week of) January 1997, and Smith and Wood were then promptly assigned to the Super Fresh job which was completed in 3 to 4 weeks (around the end of January). After the Super Fresh job, the Company had no other major projects calling for the type of electrical work Smith was hired for, and Friend assigned Smith and Wood to the warehouse, sorting parts and other cleanup work associated with the Cream O'Land and the Super Fresh projects.

During this time, according to Friend, he became concerned about payroll, that is, having skilled electricians doing menial tasks, especially in light of the falling through of the Pep Boys job. According to Friend, Smith and Wood basically performed menial tasks for nearly the entire month of February.

Friend maintained that both Smith and Wood asked about future work while they were doing shop work, specifically whether any other larger electrical projects were on the horizon. According to Friend, he honestly told them that there was nothing specific or concrete, to which both workers expressed their concern. Because he advised them that electrical work was slowing down, he hortatively asked them if they had any interest in cross-training, e.g., learning how to do generator, HVAC work, plumbing, or appliance installation work.[19] Friend recalled one specific conversation with Smith and Wood in early February 1997 near the garage and warehouse area in which he told Smith and Wood that the Company had available work in other fields but no electrical work, no projects, and very few service calls. According to Friend, Smith and Wood performed service or busy work for several weeks in February 1997, largely because the Company was negotiating the Pep Boys contract and his sales representative had advised him not to lay off anyone. However, according to Friend, the Respondent could not afford to retain Smith and Wood indefinitely; so about a week before their layoff, Friend testified that he decided to inform Smith and Wood that there was no work and that the Company could not continue keeping them employed in the fashion they were. This decision was based on what Friend described as extensive discussions with his salesmen and Emers about the Company's poor business prospects,[20] and because Smith and Wood were not amenable to cross-train for other work. Thus, the decision to discharge both Smith and Wood was reached by him on about February 20 or 21 or perhaps over that weekend.

Friend further testified:

> The decision was to lay off Mr. Smith and Mr. Wood with the pretense that the salesman was going to put extra effort into getting some work so we could rehire them back to do similar types of tasks that they were doing at Super Fresh or Creamland. [Tr. 183-184.] [Note: I believe that Friend's use of the word "pretense" was mistaken from the context of his testimony.]

According to Friend, on the following Monday—February 24—on their arrival, the Respondent's service coordinator (a man named De Franks), and later himself, informed Smith and Wood that they were being laid off.[21] Smith and Wood were told by De Franks about the reduced workload and the Company's decision to lay them off because of it. Friend confirmed De Franks and explained to the two that they would be laid off at the end of the week, that is, they were given the option of working through the week—to be paid through the last day, February 27—or terminating immediately. According to Friend, Wood did not choose to work through the week and, thus, the Respondent's records reflect his last day was February 24; Smith continued to work on Tuesday, February 25, for most or part of that day but did not work on Wednesday, February 26, as he recalls.

Friend testified that the Respondent received the letter from Aicher and the Union on the afternoon of February 25; he did not know that Smith was in any way involved with the Union prior to the receipt of the letter. Accordingly, he generally denied that the layoffs were connected to the information contained n the letter regarding Smith's union membership or his organizing activities on behalf of the Union. Rather, according to Friend, the reason for this layoff was due to the lack of electrical work,[22] and the decision to discharge them had been reached before receipt of the union letter.[23]

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with Friend privately and evidently was convinced that the layoff was for lack of work. Hence, a few days before the hearing, he signed the affidavit basically agreeing that his layoff was for lack work. At the hearing, it seemed to me that he reverted to his former position. Given that flip-flop, I, nevertheless, believe he testified as truthfully as he could under the circumstances.

[19] According to Friend, the Respondent had an abundance of generator work which entitled changing oil and filters, greasing pulleys and bearings, and inspection of electrical components. According to Friend, Smith, however, only wanted to do electrical work of the type for which they were hired on the Cream O'Land and Super Fresh projects, mainly installing wire, receptacles, light, and other fixtures. I note that Smith's training and experience seemed to lend itself to performing electrical generator work.

[20] According to Friend, by the weekend, he had been informed by one of his salesmen, Mr. Kean, that the Company was not going to be awarded the Pep Boys contract. Kean did not testify. (Tr. 191.)

[21] Evidently, Friend happened upon De Franks conversing with Wood and Smith and then joined the discussion.

[22] According to Friend, no other employees were laid off at the time of Smith's and Wood's discharges.

[23] Accompanied by his attorney, Friend provided an affidavit to the Board during the investigation stage of this case; the affidavit was not produced at the hearing. However, a portion of this affidavit was the

Applicable Legal Principles

In cases where employers are charged with violations of Section 8(a)(3)[24] and (1)[25] of the Act, the Board set forth its test of causation in the case of *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under this test, for determining, as here, whether an employer's layoff or discharge of an employee was motivated by hostility toward union membership or union activity, the General Counsel has the burden of persuasion, prima facie, that protected conduct was a substantial or motivating factor in the employer's decision. If this initial burden is met, then the burden of persuasion shifts to the employer to prove its affirmative defense, that it would have taken the same action even if the employee had not engaged in protected activity. If the reasons advanced by the employer for its action are deemed pretextual, that is, if the reasons either did not exist or were not in fact relied upon, it follows that the employer has not met its burden and the inquiry logically ends. Where an employer asserts a specific reason for its action, then its defense is that of an affirmative defense in which the employer must demonstrate by a preponderance of the evidence that the same action would have taken place even in the absence of protected conduct. Thus, an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place. *Kellwood Co.*, 299 NLRB 1026, 1028 (1990).

It is well settled under Board precedent that the timing between the employer's action and known union activity can supply reliable and competent inherent evidence of unlawful motive for purposes of the *Wright Line* analysis. *Grand Rapids Press*, 325 NLRB 1 (June 15, 1998); *Kinder Care Learning Centers*, 299 NLRB 117 (1990); *Alson Knitting, Inc.*, 301 NLRB 758 (1991). Also, where an employer accelerates a discharge or layoff of an employee in close proximity to union activity, this, too, may supply evidence of unlawful motive. *IMAC Supply*, 305 NLRB 728, 736–737 (1992); *American Wire Products*, 313 NLRB 989 (1994).

Discussion, Findings, and Conclusions

A point conceded by the parties, but to different ends, is the importance of timing in this case.

In essence, the General Counsel contends that Smith was laid off only after the Respondent received the union fax informing it of his union involvement; that before receipt of the fax, the Respondent had no announced plans to lay off employees and historically, during the slow winter months, had never laid off skilled workers but kept them on at regular salary, sometimes doing menial or nontrade related work. Furthermore, he argues, the Respondent produced no documentary evidence of a serious decline in its business at the time of its layoffs or as compared to other years to substantiate the proffered economic defense. Thus, to the General Counsel, because of the closeness in time between Smith's sudden layoff and the Respondent's receipt of the union fax, the "ineluctable" conclusion is that Smith, admitted to be a good worker, was laid off (and never recalled) because of his having engaged in protected activity.

The Respondent, for its part, minimizes to inconsequentiality any connection between its receipt of the fax and Smith's discharge. Rather, the Respondent asserts that there simply was no electrical work of the type for which he was hired or willing to do available for Smith and it could no longer afford to pay him to do menial work. As proof of the nondiscriminatory nature of Smith's layoff, the Respondent notes that Wood, a nonunion electrician, was also discharged at the same time for the same reason—no work. All in all, the Respondent attributes the need to terminate Smith (and Wood) to its inexperience on bidding on large projects and contracts, along with poor planning in terms of assessing its manpower needs. It contends that antiunion animus was not what motivated the layoff of Smith.

Thus, in essence, the Respondent contends that it reached the official decision to lay off both Smith and Wood days before it received notice of Smith's union involvement and activities because of unavailable and unrealized electrical contract business. Additionally, Smith and Wood were both aware of the Respondent's perilous economic situation but were unwilling to train for other work; thus, they were released.

I would conclude, based on the timing between the Respondent's receipt of the union letter and its sudden and unannounced decision to lay off Smith almost immediately thereafter, that the General Counsel has made a strong prima facie case showing that Smith's union membership and organizing activities were motivating factors in its layoff decision. While Wood was also laid off and he clearly was not a known proponent of the Union, I believe, based on Emers' testimony regarding the very close relationship Wood and Smith shared, that the Respondent probably determined after receipt of the letter that they, as newly hired electricians, were both involved with the Union and sought to eliminate both men to disguise its true intentions and prophylactically to kill two union birds with one stone.[26] However, whether this is correct or not, Wood's union involvement actually is not germane to this matter as he was not the subject of any charge.

Since the General Counsel has established a prima facie case, the burden shifts to the Respondent to show that it would have laid off Smith even in the absence of his union activities. I have evaluated the Respondent's proffered defense and find it wanting in persuasiveness.

subject of his cross-examination by the General Counsel. Friend acknowledged that in the affidavit he knew he received the union fax on February 25 and that he stated in the selfsame affidavit that Smith was laid off on February 27 or 28. Friend explained this departure from his hearing testimony, stating he did not have a calendar or company payroll records with him when he gave the affidavit. The General Counsel attacks Friend's credibility on this count.

[24] Sec. 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)) makes it an unfair labor practice for an employer to discriminate "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ."

[25] Sec. 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 of the Act."

Sec. 7 of the Act (29 U.S.C. § 157) provides, in pertinent part: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

[26] Based on the credible evidence of record, I would find Emers to be a supervisor or agent of the Respondent within the meaning of the Act. Emers reported directly to Friend.

At the outset, I should say that I believe the credible evidence does support the Respondent's contention that during the winter months of the relevant time frame, it seemingly experienced a slowdown in its business. However, it is equally clear that this is a historical feature of its business cycle and the Respondent has made allowances for this phenomenon in its personnel policy, mainly by assigning its skilled employees to various possibly nontrade tasks until business picked up. As I have stated, the Respondent's decision to expand its business to include larger scale electrical projects was in all likelihood predicated on the winter slowdown in its electrical service operations. Given that there was some business slowdown established by the Respondent here, the question remains as to whether the downturn was of such magnitude to justify the layoff of Smith. As noted by the General Counsel, the Respondent produced no records or financial data in support of its economic defense, offering only the on-the-job perceptions of Wood and Emers and the testimony of Friend as proof. If Friend is to be believed, the Respondent placed great store in its policy of not laying off workers. Thus, one reasonably would expect some independent corroborating proof of the Respondent's extraordinary conditions in its business that would necessitate layoffs.[27] This was not done. I would conclude, therefore, that the Respondent has not persuasively documented its economic defense.

Moreover, as is often the case, credibility is a determinant here. In this regard, the Respondent's main witness, Friend, while a sincere and well-meaning person in my estimate, did not persuade me as to the reason(s) for which he laid off Smith. Notably, I do not believe him when he testified that he hired Smith (and Wood) solely for the Cream O'Land job. As earlier noted, in my view, the Respondent's long-term business objectives included securing additional future projects, one of which, Super Fresh, was already in hand. Thus, the Respondent needed sufficient manpower for its long-term goals. Friend himself admitted that due to the Company's inexperience in electrical contracting, it had undermanned the Cream O'Land job. I believe that Smith and Wood were hired not only for Cream O'Land but to avoid the manpower problem for future projects. In fact, Wood credibly testified that he, then employed, only accepted the Respondent's offer because of Friend's assurances that there was plenty of work and that he would not be laid off.

Also, I did not find credible Friend's testimony that Smith (and Wood) would not cross-train or work in nonelectrical capacities during the slowdown and, thus, their lack of cooperation contributed to the decision to release them. It is undisputed that both men were primarily hired to hang wire, remove and install fixtures, switches, and the like. This was what they considered true electrical work. However, during their time with the Respondent, Smith helped install a boiler and dishwasher, and Wood went on a plumbing job; both men sorted material and trash and also performed service work. Smith (and Wood) credibly testified they never refused an assignment because it was nonelectrical, or even complained about their assignments.[28] Both were glad to be working and basically did what each was asked to do. Even Friend had to admit that both were good workers.

On balance, I would conclude that the Respondent's—Friend's—real reason for laying off Smith was his union membership and activities as stated in the February 25 union letter. On being apprised of this information, I believe that Friend decided to terminate him and Wood. Thus, I do not credit Friend's testimony that he had made the decision to lay off Smith and Wood over the weekend prior to February 25. As stated earlier here, Friend's policy was to keep his people working and he acted on this policy at other times and throughout the slow period in 1997. The Respondent never notified any of the employees, least of all Smith (and Wood), that layoffs were imminent. In fact, no other workers were laid off during this alleged slowdown except Wood and Smith. Moreover, a short time later, the Respondent hired additional electricians but never recalled Smith and Wood as promised by Friend. I agree with the General Counsel that it is indeed an inescapable conclusion that on receipt of the union letter, the Respondent was moved to lay off Smith.

My conclusion is buttressed by the following exchange (at Tr. 190) I had with Friend regarding his decision to lay off Smith.

> JUDGE SHAMWELL: Now the Creamland job for all practical purposes ended what[29] the end of January?
>
> THE WITNESS: The beginning of January.
>
> JUDGE SHAMWELL: The beginning of January.
>
> THE WITNESS: Yes, sir.
>
> JUDGE SHAMWELL: Why didn't you just fire him and discharge him then if that's what you hired him for?
>
> THE WITNESS: That's a very good question Your Honor. This is the thanks I get for being a nice guy.
>
> JUDGE SHAMWELL: So I believe you—I can see this record will not reflect your expressions. You told me in you own words you knew the job was over the first of January.

The referenced expression I observed on W. Friend's face during this exchange reflected a certain chagrin indicating to me that the "this" referred to was Smith's covert union organizing attempts disclosed in the letter. As W. Friend later testified, with a trace of bitterness, "[I] kept him on. Everyone has to put food on the table. Everyone has mouths to feed in a home environment. I did it to keep him on to keep him employed and try to keep him gainfully employed and at the same time I was putting pressure on our sales people who our men depend on to bring the work in." Thus, it would appear that Friend would have retained Smith for these reasons and for others as stated here.

W. Friend, however, clearly felt betrayed by Smith's participation in undercover union activities and decided to lay him off as a result.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[27] See *Craft Precision Industries*, 305 NLRB 899, 900 (1991), where sales figures were introduced by the employer to justify layoffs; and *General Combustion Corp.*, 295 NLRB 1103, 1104 (1989), where financial data was presented by the employer to establish a sufficient falling off of sales orders and backlog of business for the relevant period.

[28] Wood testified on the day of his layoff, Friend asked him if he had experience in any field other than electrical, for example, heating and air-conditioning; Wood told him he did not, his primary experience was in the electrical field. (Tr. 147.)

[29] This is an error in transcription; "what" should be "at."

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By laying off (discharging) Jonathan Smith, the Respondent violated Section 8(a)(1) and (3) of the Act.

4. The aforesaid unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in unfair labor practices warranting a remedial order, I shall recommend that it cease and desist from engaging in such conduct and that it take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily laid off (discharged) Jonathan Smith, I shall recommend that it be ordered to offer him reinstatement and make him whole for any loss of earnings and other benefits he may have suffered by virtue of the discrimination practiced against him, computed on a quarterly basis as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), less any interim earnings, plus interest as computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[30]

ORDER

The Respondent, Ebroadburl Realty Corp. t/a Power Equipment Company, Hainesport, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for supporting Local 269, International Brotherhood of Electrical Workers, AFL–CIO.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Jonathan Smith full reinstatement to his former job or, if this job no longer exists, to a substantially equivalent position without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Jonathan Smith whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to Jonathan Smith's unlawful discharge, and within 3 days thereafter notify him in writing that this has been done and that the discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its office in Hainesport, New Jersey, copies of the attached notice marked "Appendix."[31] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 27, 1996.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge employees engaged in lawful protected activity.

WE WILL NOT discharge (lay off) or otherwise discriminate against employees because of their known or suspected membership in and/or support for Local 269, International Brotherhood of Electrical Workers, AFL–CIO, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Jonathan Smith full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

[30] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[31] If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL make Jonathan Smith whole for any loss of earnings and other benefits resulting from his discharge, because of his known or suspected membership in and/or support for Local 269, International Brotherhood of Electrical Workers, AFL–CIO, less any net interim earnings, plus interest.

WE WILL within 14 days from the date of this Order, remove from our files any reference to Jonathan Smith's unlawful discharge, and WE WILL notify him in writing that this has been done and that the discharge will not be used against him in any way.

EBROADBURL REALTY CORP. T/A POWER EQUIPMENT COMPANY